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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TRISTAN D. THOMPSON,

Defendant and Appellant.

B210548

(Los Angeles County
Super. Ct. No. VA097207)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Tristan Thompson appeals from a judgment of conviction entered after a jury trial. The amended information charged a total of 10 counts against defendant. Before trial, the trial court dismissed one count on defendant's motion and later dismissed an additional count pursuant to Penal Code¹ section 1118.1. Defendant was convicted of forcible rape (§ 261, subd. (a)(2); count 1), forcible oral copulation (§ 288a, subd. (c)(2); count 2), second degree robbery (§ 211; counts 3, 4 and 5), and carjacking (§ 215, subd. (a); count 8).

The jury found true the kidnapping special circumstance (§ 667.61)² on counts 1 and 2 and the firearm use allegation (§ 12022.53, subd. (b)) on count 5. The jury found not true the firearm use allegation on count 8. In a bifurcated proceeding, defendant admitted that he had suffered a prior serious or violent felony conviction (§§ 667, subds. (a), (b)-(i), 1170.12) and served a prior prison term (§ 667.5, subd. (b)).

On count 1, the court sentenced defendant to a prison term of 50 years to life, consisting of 25 years to life, doubled as a second strike. On count 2, the court imposed a concurrent term of six years. On counts 3 and 4, the court imposed concurrent terms of three years. On count 5, the court imposed a consecutive 25 year term, which consisted of the upper term of five years, doubled as a second strike, plus 10 years for the firearm use and five years for the prior serious felony. On count 8, the court imposed a consecutive term of three years and four months, consisting of one year and eight months, one-third the midterm, doubled as a second strike. The trial court struck the remaining

¹ All further statutory references are to the Penal Code.

² The verdict forms for the kidnapping special circumstance listed subdivisions (a), (b) and (e) of section 667.61. The jury instruction on the special circumstance listed subdivision (d)(2), and the language of that subdivision was included in the instruction. As the parties apparently do, we assume the listing on the verdict forms were erroneous and the jury found true the allegations under subdivision (d) of section 667.61.

prior conviction allegations in the interests of justice. The total sentence imposed was a determinate term of 28 years and 4 months plus an indeterminate term of 50 years to life.

On appeal, defendant contends that the evidence was insufficient to support the jury's "one strike" findings, the trial court's instruction on the "one strike" allegation was improper, and the evidence was insufficient to support the conviction for carjacking. We disagree.

FACTS

A. Overview

Defendant was charged with offenses arising out of two separate incidents on August 31, 2006, and a third incident occurring on September 6, 2007.

The August 31, 2006 offenses occurred at two separate locations within a five-minute drive of one another. A sexual assault and robbery took place at a laundromat in Bellflower. About 45 minutes after the laundromat incident, a robbery occurred at a market in Paramount.

On September 6, 2006, a robbery took place at a furniture store in Cerritos. A vehicle was taken from one of the store's customers. The following morning, sheriff's deputies apprehended several men, including defendant, who were stripping the stolen vehicle.

B. Sexual Assault and Robbery (Counts 1 through 4)

On August 31, 2006, at about 9:00 p.m., three African-American men in hooded sweatshirts entered a laundromat in Bellflower. Martha R. was washing her clothes and a store employee, Candelaria Padilla (Padilla), was in a back room behind a closed door. One of the men, defendant, approached Martha R. from behind and directed her to the restroom, which was about 25 feet away.

When defendant had Martha R. in the restroom, he demanded money and she replied that she had none. Defendant pulled up her shirt and dug in her bra and shorts

looking for money. Martha R. was crying, and defendant kept telling her, “Stop crying, bitch.” He forced her to orally copulate him. After several minutes, he forced her pants down and sexually assaulted her. He then forced her to orally copulate him again until he ejaculated in her mouth.

While defendant was assaulting Martha R., the other two men approached Padilla and told her that it was a “holdup.” One of the men took some keys from her apron and told the other man to watch her and shoot her if she moved. The first man returned and asked for the keys to the change machine. Padilla said she did not have them. The men took her driver’s license and personal keys from her bag and locked her in the back room.

One of the men opened the restroom door and asked Martha R. for the keys. Martha R. said that she did not have any keys. Defendant left the restroom with the other man, closing the door behind them. After awhile, Martha R. opened the door, but the men told her to stay in the restroom and lie on the floor. When they were gone and she came out of the restroom, she realized that her car and house keys were gone. They had been on the counter.

Martha R. was examined at the hospital. DNA samples taken from Martha R.’s hand and mouth during the examination showed two genetic profiles: a major profile with Martha R.’s DNA and a minor profile that contained defendant’s DNA. It was 12,000 times more likely that this sample originated from Martha R. and defendant than from Martha R. and an unknown individual. About 99.7 percent of African-American males were excluded as possible donors.

A few weeks later, Martha R. identified defendant after viewing several still photographs developed from a surveillance video camera recording of the incident. On September 11, 2006, Martha R. identified two photographs in a six-pack photographic lineup, one of which was of defendant, that looked like her attacker, but she was not sure of her identification. On December 19, 2006, Martha R. identified defendant in a live lineup as the man who assaulted her. She also identified defendant at the preliminary hearing and trial.

Padilla viewed photographs of three men at a liquor store. She identified two of the men as the ones who were in the back room with her.

C. *Robbery (Count 5)*

On August 31, 2006, about 45 minutes after the laundromat incident, Maneesh Bassi (Bassi) and Jaspreet Singh (Singh) were working at a market in Paramount. Bassi went outside to throw away a bottle. As he was walking back into the market, he was approached by defendant and two other men wearing baggy hooded sweatshirts. Defendant pulled out a black revolver and pointed it at Bassi. As Singh came to the front of the store, defendant pointed the gun at him and told him to get down on the floor or he would be killed.

Defendant directed Bassi to go behind the ATM machine located near the cash register. The men opened the cash register and took about \$40 from it. They also took Bassi's wallet, cell phone and gold chain. Store security cameras were operating and portions of the tape of the robbery were played for the jury.

Initially, when Bassi was shown photographs of possible suspects, he said he did not recognize anyone because he didn't want to get involved. Later, he looked at photographs in a six-pack and identified defendant as the man with the gun. Bassi also identified him at trial.

D. *Carjacking (Count 8)*

On September 6, 2006, around 9:30 p.m., Norvelle Bennett (Bennett) and her friend, Allisen Sutton (Sutton), were in a furniture store with Bennett's three-year-old daughter. Defendant and two men, wearing sweatshirt hoods over their heads, entered the store. One of the men announced a robbery, put a gun to Sutton's head and took her ring and purse. Sutton never saw the faces of any of the three robbers.

Another man approached Bennett, and she felt a gun pressed against her head. The man took her purse and cell phone from her pocket. The robbers asked for keys. Sutton said that she did not have any keys. Bennett reached into her pocket, pulled out

her car keys and held them in the air. One of the robbers grabbed the keys and asked if they were for the truck parked in front of the store. Bennett said they were. The robbers left the store, telling the customers to stay on the floor for 10 minutes. When Bennett got up and looked outside, her truck was gone.

Augustina Montoya (Montoya) and Brandon Dixon were working at the furniture store at the time of the robbery. One robber turned his gun on Montoya and told her to get down on the floor. He took Montoya's purse. Montoya could not describe the robbers and was not able to identify defendant in court.

On September 7, 2006, at about 9:00 a.m., Detective Nader Chahine responded to a vehicle-stripping call. The vehicle was Bennett's truck. Three of the four men stripping the truck were apprehended, including defendant. During a patdown search, police recovered a pair of gloves and a locking lug nut from defendant's pocket. Several items were missing from the truck, including clothes, backpacks, DVDs, and money. Additionally, Bennett's lug nut key was missing from the glove box.

On September 8, 2006, the police searched a residence in Long Beach. They recovered items taken during the market robbery, including Bassi's personal items. A California identification in defendant's name was also recovered.³

DISCUSSION

A. Sufficiency of Evidence to Support “One Strike” Findings

Defendant contends that the evidence was insufficient to support the jury's “one strike” findings on counts 1 and 2 based on acts of aggravated kidnapping. We disagree.

In reviewing a sufficiency of evidence claim, our role is a limited one. The test to determine sufficiency of evidence is ““whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. . . . On appeal, we must

³ Defendant presented no evidence in his defense.

view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Matters of credibility of witness and weight of the evidence are “the exclusive province” of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We cannot substitute our evaluation of a witness’s credibility for that of the trier of fact. (*Ibid.*)

Section 667.61, the “one strike” law, imposes a 25-year-to-life sentence for specified felony sex offenses under certain circumstances. The specified offenses include rape and oral copulation. (*Id.*, subs. (c)(1) & (c)(7).) Under subdivision (d)(2), the “one strike” law applies if “[t]he defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c).”

Defendant contends that the special circumstance in section 667.61, subdivision (d)(2), only applies where the defendant specifically intended to commit a sexual offense listed in subdivision (c) when he kidnapped the victim. We disagree.

People v. Jones (1997) 58 Cal.App.4th 693, review denied January 28, 1998, flatly rejected defendant’s contention. In *Jones*, a prosecution for multiple sexual assaults and other crimes, the court found that it was not necessary to show that the defendant intended to commit the assaults when he kidnapped the victim. The court observed that the kidnapping special circumstance “by its terms applies if (1) the defendant ‘is convicted of’ a specified sexual offense, (2) ‘[t]he defendant kidnapped the victim’ of the sexual offense, and (3) ‘the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent’ in the sexual offense. (§ 667.61, subs. (a), (c), (d)(2).) Nothing in this definition explicitly requires that the defendant kidnap the victim for the purpose of committing the sexual offense.” (*Jones, supra*, at pp. 716-717).

The *Jones* court further noted that “[t]he specific intent requirement is entirely separate from the ‘risk of harm’ requirement, and exists for different reasons. The Legislature deliberately imported the ‘risk of harm’ requirement into the one strike aggravated kidnapping circumstance. We see no reason to drag the specific intent requirement along with it. We conclude there could be sufficient evidence to support the aggravated kidnapping circumstance even if there was no evidence that defendant kidnapped the victim with the preexisting specific intent to commit the sexual offense.” (*People v. Jones, supra*, 58 Cal.App.4th at p. 717.)

Even if we rejected *Jones* and accepted defendant’s contention that section 667.61, subdivisions (a) and (d)(2), require a specific intent to commit a sexual offense, the evidence of such intent was present. Defendant moved Martha R. from the open area in the laundromat to a restroom, approximately 25 feet away. After he closed the door, he did search for money, but he then proceeded to commit sexual offenses against Martha R. If defendant had truly “only” intended to rob Martha R., what purpose was there in taking her 25 feet into a restroom and then closing the door? It is certainly reasonable to assume that defendant intended to sexually assault Martha R. when he took her into the restroom and closed the door.

Defendant contends that the movement into the restroom was “incidental to and with the intent to facilitate the robbery.” As our previous discussion makes clear, there was sufficient evidence that the movement into the restroom was not merely incidental to and intended to facilitate the robbery. Rather, it met the test for the kidnapping special circumstance.

For there to be aggravated kidnapping, the required movement must meet a two prong test: (1) the movement must be beyond that merely incidental to the underlying offense, and (2) that movement must increase the risk of harm over and above that necessarily present in the crime intended to be committed. (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) The two aspects are not mutually exclusive but are interrelated. The asportation requirement under section 667.61, subdivision (a), is the same as that for a

violation of section 209, subdivision (b).⁴ (*People v. Martinez* (1999) 20 Cal.4th 225, 235-237.)

Here, moving Martha R. 25 feet into the restroom was not merely incidental to the sexual assaults. It increased the risk of harm over and above that necessary to commit the underlying offenses, in that defendant was able to sexually assault the victim out of the view of any other witnesses, eliminating the risk that someone witnessing the attack would summon help. It gave him time to commit multiple assaults. Additionally, by placing his victim in a small, closed room, defendant decreased her ability to escape. Thus, both prongs of the aggravated kidnapping test were met. (*People v. Rayford*, *supra*, 9 Cal.4th at pp. 12-13.)

B. “One Strike” Instruction

Defendant contends that, even assuming the evidence was sufficient to support a finding that the movement of Martha R. into the restroom was to commit a sexual assault, the trial court’s “one strike” instruction did not require the jury to make that finding. Defendant contends that the instructions allowed the jurors to render a true finding on the “one strike” allegation even if they believed that the kidnapping was for the purpose of robbery and not the sexual offenses of which defendant was convicted.

The trial court instructed the jurors on the aggravated kidnapping special circumstance with CALCRIM No. 3175 as follows:

“If you find the defendant guilty of the crimes charged in Counts 1 and/or 2, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant kidnapped Martha R., increasing the risk of harm to her. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.

⁴ Section 209, subdivision (b), refers to kidnapping or carrying away any individual to commit robbery or certain sexual offenses.

“To prove this allegation, the People must prove that: [¶] 1. The defendant took, held, or detained Martha R. by the use of force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved Martha R. or made her move a substantial distance; [¶] 3. The movement of Martha R. substantially increased the risk of harm to her beyond that necessarily present in the Rape (count 1) and/or Forcible Oral Copulation (count 2); [¶] AND [¶] 4. Martha R. did not consent to the movement[.]

“Substantial distance means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of Rape and/or Forcible Oral Copulation. In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement.

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

As previously indicated, a true finding on the kidnapping special circumstance under section 667.61, subdivision (d)(2), does not require a finding that the defendant had the specific intent to sexually assault the victim before he kidnapped her. CALCRIM No. 3175 properly instructed the jury as to the elements required for the special circumstance. (See *People v. Jones, supra*, 58 Cal.App.4th at p. 717; see also *People v. Martinez, supra*, 20 Cal.4th at pp. 235-237.)

Moreover, we note that during argument, defense counsel did not argue that defendant did not have the intent to sexually assault Martha R. when he kidnapped her. His argument was that the movement of Martha R. did not constitute kidnapping. Defense counsel did not ask the trial court to modify the kidnapping special circumstance instruction during discussions on the jury instructions.

The People submit that defendant’s claim of instructional error fails regardless of its merit because he failed to ask the court to clarify or modify the kidnapping special circumstance instruction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1211; *People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.) Defendant counters that the trial court has a

duty to instruct correctly on the law relevant to the issues raised by the evidence. (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.) Defendant also contends that section 1259 provides that the appellate court may “review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” We need not reach the People’s claim of waiver since we find the instruction given was correct.

We similarly reject defendant’s claim of ineffective assistance of counsel for failure to object to the kidnapping special circumstance instruction given the jury. The trial court properly instructed the jury with CALCRIM No. 3175. Defense counsel was not ineffective in failing to make groundless objections. (See, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 616.)

C. Sufficiency of Evidence to Support Carjacking Conviction

Defendant contends that the evidence was insufficient to support the jury’s carjacking verdict. Specifically, defendant claims that because the taking of the keys occurred during the course of an intended robbery within a retail establishment and was some distance from the vehicle taken, the carjacking conviction cannot stand. We disagree.

Section 215, subdivision (a), defines carjacking as “the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.”

A carjacking may occur where neither the possessor nor the passenger is inside or at the vehicle. (*People v. Coryell* (2003) 110 Cal.App.4th 1299, 1302-1303; *People v. O’Neil* (1997) 56 Cal.App.4th 1126, 1131.) The requirement that the vehicle be taken “from the person” or “from the immediate presence” indicate that the statute does not require actual physical possession. (*People v. Medina* (1995) 39 Cal.App.4th 643, 650.)

Rather, it requires only that the victim's vehicle be within her "reach or control such that possession could be retained if the victim was not overcome by fear." (*Ibid.*)

In *People v. O'Neil*, *supra*, 56 Cal.App.4th 1126, the defendant had entered the victim's truck and had begun to move it while the victim was inside his residence. While defendant was still in the process of taking the truck, the victim arrived, confronted defendant and got into the truck bed. After defendant became upset, the victim became fearful and relinquished his truck to defendant. (*Id.* at p. 1132.) The court concluded the evidence supported defendant's carjacking conviction. (*Id.* at p. 1134.)

In *People v. Hoard* (2002) 103 Cal.App.4th 599, the defendant took keys to the victim's car while the victim was confined in a store the defendant was robbing; her car was outside in the parking lot. The court held the elements of carjacking were established despite the fact that the car was not taken from the victim's person or immediate presence, because the defendant forced the victim to relinquish her keys, and consequently took control of her car, through force or fear. (*Id.* at p. 609.)

The circumstances in the instant case are similar to those in *Hoard*. Defendant and his accomplices robbed the furniture store while the victim was a customer. The robbers asked for car keys. The victim pulled out the keys to her vehicle and held them in the air. One of the robbers asked if they were the keys to the truck parked in front of the store and the victim replied that they were. The robber then indicated that he had keys and he and his accomplices left in the victim's vehicle. As in *Hoard*, the evidence is sufficient to support defendant's carjacking conviction.

People v. Coleman (2007) 146 Cal.App.4th 1363, relied on by defendant, is distinguishable. In *Coleman*, the defendant entered a shop and told the employee at gunpoint to give him the keys to a vehicle owned by the shop owner. The employee complied. The appellate court held that "[t]he victim—a store employee in the general vicinity of the store owner's car keys—does not fall within the category of persons that the carjacking statute was designed to protect." (*Id.* at p. 1372.) There was no evidence that the employee had ever been or would be a driver of or a passenger in the vehicle.

(*Id.* at p. 1373.) In the instant case, however, the keys were taken by force from the owner of the vehicle. The rationale of *Coleman* does not apply.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.